

IN THE
MISSOURI SUPREME COURT

NO. SC 84092

STATE OF MISSOURI, ex rel. SSM HEALTH CARE ST. LOUIS,

Relator,

v.

MARGARET M. NEILL, Circuit Court Judge, 22nd Judicial Circuit, Missouri,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY
CAUSE NO. 012-1580

OPENING BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

This action involves three issues. First, this case presents the issue of whether Mo. Rev. Stat. § 355.176 (4) is the exclusive venue statute for actions against nonprofit corporations, regardless of the presence of other defendants. Second, this case presents the question of how “residence” is defined for a Missouri nonprofit corporation under Mo. Rev. Stat. § 508.010 . Third, this case presents the issue of whether a Missouri nonprofit defendant can be used to establish venue under § 508.010 where none of the for profit defendants, whether individuals or corporations, have the requisite “residence” venue contact required under § 508.010. These issues involve the construction of statutes of this State. Therefore, this Court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

SUMMARY OF THE CASE

Respondent, a Circuit Court Judge in the City of St. Louis, ruled that venue in this matter is proper in the City of St. Louis. This ruling was incorrect in two respects. First, the Circuit Court ignored the mandates of Mo. Rev. Stat. § 355.176, a special venue statute for Missouri nonprofit corporations. Instead, the Circuit Court held that the general venue statute, Mo. Rev. Stat. § 508.010, is the proper venue statute when an individual and a Missouri nonprofit corporation are sued in the same lawsuit. Second, the Circuit Court incorrectly held that for purposes of § 508.010, a Missouri nonprofit corporation resides in the county where it has an office or agent for the transaction of its usual and customary business per Mo. Rev. Stat. § 508.040.

Venue for a suit against a Missouri nonprofit corporation, whether other types of entities or individuals are named as defendants, is governed by Mo. Rev. Stat. § 355.176 (4), the special venue statute for Missouri nonprofit corporations. Section 355.176(4) states that suits against nonprofit corporations “shall” be commenced “only” where the cause of action accrued, or where the nonprofit corporation maintains its registered agent or principal place of business. The language of § 355.176(4) is both mandatory (“shall”) and exclusive (“only”) and trumps all other venue statutes when a Missouri nonprofit corporation is named as a defendant.

In the case before this Court, suit was brought in the City of St. Louis against SSM Health Care St. Louis (“SSM”), a Missouri nonprofit corporation, and Dr. Nanci J. Bucy (“Dr. Bucy”), a resident of St. Charles County. The cause of action accrued in St. Charles County. SSM maintains both its registered agent and its principal place of

business in St. Louis County. Therefore, under § 355.176 (4), venue is improper in the City of St. Louis.

Alternatively, if this Court were to find that venue should be analyzed under Mo. Rev. Stat. § 508.010, venue in this case is only proper where the cause of action accrued or where the defendants reside. No current Missouri statute or case law defines “residence” for a Missouri nonprofit corporation. However, Missouri statutes (Chapter 355) require nonprofit corporations to maintain a registered office and registered agent. This statutory requirement gives Missouri nonprofit corporations a fixed and certain location. As such, a Missouri nonprofit corporation should be deemed to reside where it maintains its registered office and registered agent. Therefore, if a nonprofit corporation is deemed to reside where it maintains its registered office and registered agent, venue is not proper in the City of St. Louis.

Under § 508.010, alternatively, a Missouri nonprofit corporation should be deemed to reside where it maintains its registered agent or principal place of business. In defining the residence of other corporate entities, Missouri case law requires this Court look to where venue would be proper if that corporate entity had been the sole defendant in the lawsuit. There can be no doubt that if SSM had been the only defendant in this lawsuit, § 355.176 (4) would be the applicable venue statute and venue would be proper where SSM maintains its registered agent or principal place of business. Since SSM maintains both its registered agent and principal place of business in St. Louis County, City venue is improper.

Finally and alternatively, this Court should refrain from analyzing SSM's § 508.040 venue contacts to establish SSM's "residence" under § 508.010 where the co-defendant, an individual, does not independently meet the residence contact enumerated in § 508.010. Simply stated, where the cause of action did not accrue in the City of St. Louis and the individual defendant, Dr. Bucy, does not reside in the City of St. Louis as set forth in § 508.010, SSM's venue contacts should be analyzed under § 355.176 and not under § 508.040. Under the proper § 355.176 analysis, venue is improper in the City of St. Louis because SSM does not maintain its registered agent or principal place of business in the City of St. Louis.

STATEMENT OF FACTS

I. Introduction.

On June 7, 2001, Plaintiff Noah D. Thompson, by and through his Next of Friend, Gregory A. Thompson (“Plaintiff”), filed his Petition in the Circuit Court of the City of St. Louis against Defendants SSM Health Care St. Louis (“SSM”) and Nanci J. Bucy, D.O. (“Dr. Bucy”), Cause No. 012-1580, alleging medical malpractice.¹ The causes of action pleaded against SSM and Dr. Bucy accrued at SSM St. Joseph Hospital West located in St. Charles County, Missouri. (*See* Appendix Exhibit 1 at ¶¶ 2-4).

II. The Parties.

At all times during 2001, Dr. Bucy resided at 46 Fox Hollow Drive, St. Charles, St. Charles County, Missouri 63303. (*See* Affidavit of James C. Freeman at ¶ 5, Appendix Exhibit 2). SSM is a Missouri not-for-profit corporation organized under Chapter 355 of the Missouri Revised Statutes. (*See* Affidavit of June L. Pickett at ¶ 2, Appendix Exhibit 4). SSM’s registered agent is Sister Mary Jean Ryan, FSM, whose registered office is located at 477 North Lindbergh Blvd., St. Louis, St. Louis County, Missouri 63141. (*See* Affidavit of June L. Pickett at ¶ 3, Appendix Exhibit 4). SSM’s principal place of business is also located at 477 North Lindbergh Blvd., St. Louis, St. Louis County, Missouri 63141. (*See* Affidavit of June L. Pickett at ¶ 5, Appendix Exhibit 4). At no time during 2001 did SSM maintain its registered office, registered agent or

¹ A true and correct copy of the aforesaid Petition is attached hereto in the Appendix as Exhibit 1.

principal place of business in the City of St. Louis. (*See* Affidavit of June L. Pickett at ¶ 6, Appendix Exhibit 4).

III. The Procedural History Of The Case.

A. Procedure Before the Circuit Court

On June 28, 2001, in response to Plaintiff's Petition, SSM filed its Motion to Transfer Venue and Legal Memorandum pursuant to Rule 51.045 of the Missouri Rules of Civil Procedure.² On July 5, 2001, SSM filed the executed Affidavit of June L. Pickett in support of its Motion to Transfer Venue.³ Also on July 5, 2001, Plaintiff filed his Reply to the Motion of Defendant SSM Health Care St. Louis to Transfer Venue.⁴

² A true and correct copy of the aforesaid Motion of Defendant SSM Health Care St. Louis to Transfer to a Proper Venue is attached hereto in the Appendix as Exhibit 2 and a true and correct copy of the aforesaid Legal Memorandum in Support of Motion of Defendant SSM Health Care St. Louis to Transfer to a Proper Venue is attached hereto in the Appendix as Exhibit 3.

³ A true and correct copy of the aforesaid Affidavit of June L. Pickett is attached hereto in the Appendix as Exhibit 4.

⁴ A true and correct copy of the aforesaid Reply of Plaintiff to Motion of Defendant SSM Health Care St. Louis to Transfer Venue is attached hereto in the Appendix as Exhibit 5.

On August 6, 2001, SSM filed a Reply to Plaintiff's Reply to Motion to Transfer Venue.⁵ The following day, on August 7, 2001, Respondent heard oral argument on SSM's Motion to Transfer Venue. Following oral argument, Plaintiff filed a Response to Defendant SSM Health Care's Reply.⁶ On August 8, 2001, Respondent issued an Order denying SSM's Motion to Transfer Venue finding that venue was proper in the City of St. Louis.⁷

B. Procedure Before the Appellate Court

On August 21, 2001, SSM filed a Petition for Writ of Prohibition or, in the Alternative, for Writ of Mandamus in the Missouri Court of Appeals, Eastern District asking the Appellate Court to bar Respondent from taking any further action other than ordering the case be transferred to St. Louis County or St. Charles County. By Order dated November 7, 2001, the Missouri Court of Appeals, Eastern District denied SSM's Petition. However, Presiding Judge Crane wrote a dissent in favor of the issuance of a preliminary writ. The dissent found that venue in this case should be determined under §

⁵ A true and correct copy of the aforesaid SSM Health Care St. Louis's Reply to Plaintiff's Reply to Motion to Transfer to a Proper Venue is attached hereto in the Appendix as Exhibit 6.

⁶ A true and correct copy of the aforesaid Plaintiff's Response to Defendant SSM Health Care's Reply is attached hereto in the Appendix as Exhibit 7.

⁷ A true and correct copy of the aforesaid Order is attached hereto in the Appendix as Exhibit 8.

508.010. Further, the dissent relied upon State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962), in holding that the residence of a Missouri nonprofit corporation should be where it maintains its registered office or registered agent. The dissent found that the requirements of Mo. Rev. Stat. § 355.161, which mandates that a Missouri nonprofit corporation maintain a registered office and registered agent, gives it a “fixed, definite and certain” location for purposes of determining residence. Following this analysis, the dissent held that venue is improper in the City of St. Louis because SSM maintains its registered office and registered agent in St. Louis County and Dr. Bucy resides in St. Charles County.⁸

C. Procedure Before This Court

On November 21, 2001, SSM filed its Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus and Suggestions in Support. On December 18, 2001, this Court entered a Preliminary Writ of Prohibition. On January 15, 2002, Respondent filed an Answer & Return to Preliminary Writ of Prohibition.

⁸ A true and correct copy of the aforesaid Appellate Court Order is attached hereto in the Appendix as Exhibit 9.

POINTS RELIED ON

- I. Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because under Mo. Rev. Stat. § 355.176 (4) venue is improper in the City of St. Louis in that § 355.176(4) is the exclusive venue statute for actions against Missouri nonprofit corporations, regardless of the presence of co-defendants, and Relator does not maintain its registered agent or principal place of business in the City of St. Louis and the cause of action did not accrue in the City of St. Louis.**

State ex rel. City of St. Louis v. Kinder, 698 S.W.2d 4 (Mo. 1985)

State ex rel. City of Bella Villa v. Nicholls, 698 S.W.2d 44 (Mo. Ct. App. 1985)

State ex rel. Wasson v. Schroeder, 646 S.W.2d 105 (Mo. banc 1983)

St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998)

Mo. Rev. Stat. § 355.176

Mo. Rev. Stat. § 508.050

Mo. Rev. Stat. § 508.060

Mo. Rev. Stat. § 508.070

II. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its registered office and registered agent in St. Louis County.

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1963)

Mo. Rev. Stat. § 508.010

Mo. Rev. Stat. § 355.096

Mo. Rev. Stat. § 355.161

Mo. Rev. Stat. § 351.370

III. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its registered agent and principal place of business in St. Louis County.

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991)

State ex rel. Henning v. Williams, 131 S.W.2d 561 (Mo. banc 1939)

State ex rel. Wasson v. Schroeder, 646 S.W.2d 105 (Mo. banc 1983)

Mo. Rev. Stat. § 508.010

Mo. Rev. Stat. § 355.176

IV. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because under Mo. Rev. Stat. § 508.010 venue is improper in the City of St. Louis in that venue cannot be established under § 508.010 solely because SSM, a Missouri nonprofit corporate defendant, might have an office or agent for the transaction of its usual and customary business in the City of St. Louis as SSM is a Missouri nonprofit corporation that maintains its registered agent and principal place of business in St. Louis County, Dr. Bucy, the individual defendant, resides in St. Charles County and the cause of action accrued in St. Charles County.

Mo. Rev. Stat. § 355.176

Mo. Rev. Stat. § 508.010

Mo. Rev. Stat. § 508.040

ARGUMENT

Standard of Review

A writ of prohibition or, in the alternative, writ of mandamus is a proceeding to test whether Respondent is acting in excess of her jurisdiction. State ex. rel. Reedcraft Manufacturing, Inc. v. Kays, 967 S.W.2d 703, 704 (Mo. Ct. App. 1998). The determination of jurisdiction is a question of law that the Court should consider *de novo*. Boatmen's Bancshares, Inc. v. Director of Revenue, 757 S.W.2d 574, 574 (Mo. 1998) ; Laser Vision Ctrs., Inc. v. Laser Vision Ctrs. Int'l, SpA, 930 S.W.2d 29, 31 (Mo. Ct. App. 1996) .

I. Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because under Mo. Rev. Stat. § 355.176 (4) venue is improper in the City of St. Louis in that § 355.176(4) is the exclusive venue statute for actions against Missouri nonprofit corporations, regardless of the presence of co-defendants, and Relator does not maintain its registered agent or principal place of business in the City of St. Louis and the cause of action did not accrue in the City of St. Louis.

Under Mo. Rev. Stat. § 355.176 (4) ,⁹ suits against a Missouri *nonprofit* corporation “**shall** be commenced **only** in one of the following locations:

- (1) the county in which the nonprofit corporation maintains its principal place of business; or
- (2) the county where the cause of action accrued; or
- (3) the county in which the office of the registered agent for the nonprofit corporation is maintained (emphasis added).¹⁰

The Circuit Court incorrectly held in its Order of August 8, 2001 that § 355.176 applies where suit is brought against only a nonprofit corporation or multiple nonprofit corporations. Section 355.176(4) is a special venue statute for suits filed against

⁹ In its August 8, 2001 Order (Exhibit 8, ftnt 1), the Circuit Court correctly found that § 355.176 was repealed by HSSB 768, which was later held to be unconstitutional, making such repeal invalid. St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998); *see* Missouri Ins. Co. v. Morris, 255 S.W.2d 781, 782 (Mo. banc 1953) (holding that when a statute is intended to substitute a new section for a repealed section and the new section is held unconstitutional, the repealing clause is likewise invalid and the old section remains in effect).

¹⁰ For the Court’s convenience, a copy of Mo. Rev. Stat. § 355.176 is attached in the Appendix as Exhibit 10.

Missouri nonprofit corporations.¹¹ When a general and special venue statute deal with the same subject matter, the specific statute prevails over the general one. State ex rel. City of Bella Villa v. Nicholls, 698 S.W.2d 44, 45 (Mo. Ct. App. 1985) . General rules establishing venue are subject to specific statutes which place venue elsewhere. State ex rel. Wasson v. Schroeder, 646 S.W.2d 105, 107 (Mo. banc 1983) .

The plain language of § 355.176 (4) makes clear that suits against Missouri nonprofit corporations “**shall**” be commenced “**only**” in one of three locations, regardless of the presence of other defendants in the lawsuit. This language is similar to the language contained in other special venue statutes. For example, Mo. Rev. Stat. § 508.060 provides, “[a]ll actions whatsoever against any county **shall** be commenced in the circuit court of such county . . .” (emphasis added). Additionally, Mo. Rev. Stat. § 508.050 states: “[s]uits against municipal corporations as defendant or co-defendants **shall** be commenced **only** in the county in which the municipal corporation is situated” (emphasis added). Missouri Courts, looking at the language of these statutes, have construed both § 508.060 and § 508.050 as the mandatory and exclusive venue statutes for suits against municipalities or counties. Section 355.176 should be accorded the same mandatory status as § 508.060 and § 508.050.

¹¹ The placement of § 355.176 (4) with statutes relating to nonprofit corporations (rather than placement near other special venue statutes) is determined by the Missouri Revisor of Statutes. § 3.050.

In State ex rel. City of St. Louis v. Kinder, 698 S.W.2d 4 (Mo. 1985) , the Court construed § 508.060, a special venue statute that provides: “[a]ll actions whatsoever against any county **shall** be commenced in the circuit court of such county,” as mandatory and exclusive (emphasis added). In Kinder, plaintiffs brought suit against the City of St. Louis and the Director of Revenue of Missouri in Cole County, Missouri. Plaintiffs argued that under Mo. Rev. Stat. § 508.010 (2), venue was proper in Cole County because the Director of Revenue is a resident of Cole County. The Court held that the special venue statute § 508.060 prevailed over § 508.010 and, even without the “co-defendant” language contained in § 508.050, the Court found that § 508.060 is “mandatory.” Id. at 6. The Court reasoned that in passing § 508.060, the Missouri Legislature created a special venue exception for counties from the general venue statute, § 508.010. Looking to the language of § 508.060, the Court held the statutory language to be *mandatory*, applied the special venue statute (despite the presence of a non-county defendants) and transferred the case to the City of St. Louis. Id. at 4.

Likewise, Missouri Courts have construed the municipal special venue statute, § 508.050, and found that it is a mandatory special venue statute pertaining to suits brought against municipal corporations. In Bella Villa, plaintiff brought suit against the City of Bella Villa, a municipal corporation located entirely in St. Louis County, and an individual residing in the City of St. Louis. Analyzing the statute’s “unambiguous language,” the Court found that the special venue statute was controlling even where suit was brought against a municipality and an individual. Bella Villa, 698 S.W.2d at 45. The Court held that the special venue statute prevailed over the general venue statute.

Applying § 508.050, the Court ordered the case transferred to St. Louis County, where the City of Bella Villa is located. Id.

Conversely, where the language of the statute is not mandatory, Missouri Courts have found that certain special venue statutes are permissive. In State ex rel. O’Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951) , the Court held that the motor carrier special venue statute, Mo. Rev. Stat. § 508.070, is not mandatory, but rather permissive. Section 508.070 does not contain any mandatory language, but rather provides that suit “may” be brought in certain locations.

Respondent argues in the Answer & Return to Preliminary Writ filed on January 15, 2002, that the word “shall” does not necessarily make a venue statute mandatory. In support, Respondent argues that Mo. Rev. Stat. § 508.040 provides that suits against corporations “shall” be commenced in specific locations and despite the “shall” language, venue for suits against a corporation sued along with an individual is governed by § 508.010. However, Respondent fails to recognize that § 355.176 is a special venue statute for the nonprofit segment of corporations. Section 508.040 is a general venue statute, which applies to all corporations except those corporations for which there is a special venue statute, i.e. nonprofit corporations and municipal corporations. Further, Respondent also fails to recognize and appreciate that § 355.176(4) contains more than the “shall” language of § 508.040. Importantly, the language of § 355.176(4) is clearly mandatory and exclusive– “suits against a nonprofit corporation **shall** be commenced **only**” in one of three locations (emphasis added). Section 355.176(4) should be construed consistently with other special venue statutes containing similar language.

Following the construction of § 508.060 and § 508.050 in the aforementioned cases, the word “only” when utilized in conjunction with the word “shall” as contained in § 355.176 should be interpreted to mean that any time a Missouri nonprofit corporation is sued, regardless of the presence of for profit entities or individuals as co-defendants, venue should be governed by § 355.176(4). See Kinder, 698 S.W.2d 4; Bella Villa, 698 S.W.2d 44.

In the case before the Court, there is no factual basis for City venue under § 355.176 (4). At the time suit was filed and at all times throughout 2001, SSM, a Missouri nonprofit corporation, maintained its registered agent and principal place of business within St. Louis County at 477 North Lindbergh, St. Louis, Missouri, 63141. (Appendix Exhibit 4 at ¶¶ 3 and 5). Plaintiff’s alleged injuries were sustained at SSM St. Joseph Hospital West, which is located in St. Charles County. (Appendix Exhibit 1 at ¶ 2). Accordingly, the cause of action, if any, accrued in St. Charles County. SSM did not maintain its registered agent or principal place of business in the City of St. Louis, nor did the cause of action accrue in the City of St. Louis. Therefore, City of St. Louis venue is improper under § 355.176(4).

II. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and

SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its registered office and registered agent in St. Louis County.

Solely in the alternative to Point I *supra*, SSM sets forth the following argument. Even if this Court finds that venue is determined by Mo. Rev. Stat. § 508.010,¹² venue in the City of St. Louis is still improper because a Missouri nonprofit corporation should be deemed to reside where it maintains its registered agent and registered office. Unlike Chapter 351 of Missouri's Revised Statutes, which provides that a corporation is a resident of the county where its registered office is maintained (Mo. Rev. Stat. § 351.375.2), Chapter 355 does not explicitly provide that a nonprofit corporation is a resident of the county where it maintains its registered agent and registered office.

As there is no current Missouri statute or case law that defines the residence of a Missouri nonprofit corporation, Chapter 355 must be judicially construed. In construing Chapter 355 to determine the county of residence for a Missouri nonprofit corporation, "it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times." Citizens Elec. Corp. v. Director of Dept. of Revenue, 766 S.W.2d 450, 452 (Mo. banc 1989).

¹² For the Court's convenience, a copy of Mo. Rev. Stat. § 508.010 is attached in the Appendix as Exhibit 11.

Under Chapter 355, Missouri's Not-For-Profit Corporation Law, the Articles of Incorporation filed with the Secretary of State's Office must contain:

- (3) The street address of the corporation's initial registered office and the name of its initial registered agent at that office. Mo. Rev. Stat. § 355.096.¹³

Additionally, per Mo. Rev. Stat. § 355.161, a nonprofit corporation must continuously maintain in this state:

- (1) A registered office with the same address as that of the registered agent; and
- (2) A registered agent, who may be:
 - (a) an individual who resides in this state and whose office is identical with the registered office; . . .¹⁴

These Chapter 355 nonprofit statutes are similar to Mo. Rev. Stat. § 351.370, which applies to for profit corporations and provides in relevant part that:

1. Each corporation shall have and continuously maintain in this state:
 - (1) A registered office which may be, but need not be, the same as its place of business;

¹³ For the Court's convenience, a copy of Mo. Rev. Stat. § 355.096 is attached in the Appendix as Exhibit 12.

¹⁴ For the Court's convenience, a copy of Mo. Rev. Stat. § 355.161 is attached in the Appendix as Exhibit 13.

- (2) A registered agent, . . . , whose business office is identical to such registered office, . . . ” (emphasis added).¹⁵

Here, the requirements of Chapter 351 and Chapter 355, requiring each type of corporation to maintain a registered agent and a registered office at the same address are remarkably similar and clearly involve related subject matter. Therefore, “[w]hen the legislature enacts a statute referring to terms which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial action.” Citizens Electric Corp., 766 S.W.2d at 452. A Chapter 351 corporation is deemed to be a resident of the county where its registered agent and registered office are located for purposes of venue analysis under § 508.010 (Futrell v. Luhr Bros., Inc., 916 S.W.2d 348, 352 (Mo. Ct. App. 1996); n.2; State ex rel. Parks v. Corcoran, 652 S.W.2d 686, 688 (Mo. Ct. App. 1981)). Likewise, a Chapter 355 not-for-profit entity that has complied with Missouri statutes should be deemed to be a resident

¹⁵ For the Court’s convenience, a copy of Mo. Rev. Stat. § 351.370 is attached in the Appendix as Exhibit 1A.

of the county where it maintains its registered agent and registered office.¹⁶

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962),¹⁷ sets forth a rationale which is equally applicable in construing Chapter 355 for purposes of determining the residence of a Missouri nonprofit corporation. In Bowden, plaintiff, a resident of Boone County, filed suit in Jackson County Circuit Court against an individual, a resident of Franklin County, and a foreign corporation. The cause of action

¹⁶ Historically, Missouri Courts, relying on Mo. Rev. Stat. § 355.170, have held that the residence of a Missouri nonprofit corporation is in the county where it maintains its registered office. State ex rel. Steinhorn v. Forder, 792 S.W.2d 51, 53 (Mo. Ct. App. 1990) ; State ex rel. Vaughn v. Koehr, 835 S.W.2d 543, 544 (Mo. Ct. App. 1992) . While § 355.170 was repealed in 1995, this Court should still consider the holdings of these cases persuasive in its ruling on this case.

¹⁷ Respondent argues in its Answer & Return to Preliminary Writ filed in this Court on January 15, 2002 that SSM's reliance on Bowden is misplaced because Chapter 355 does not define the residence and because some of the Chapter 351 statutes relied on in Bowden have been repealed. However, it is important to note that at the time Bowden was decided, no statute defined residence of foreign corporations either. Further, while some of the statutes relating to foreign corporations have changed since the time Bowden was decided, the requirements of Mo. Rev. Stat. § 351.620 , the section relied upon most heavily by the Court, still exist in Mo. Rev. Stat. § 351.576 (1990), and the Court's reasoning remains instructive.

accrued in Franklin County and the foreign corporation's registered agent was located in the City of St. Louis. Further, the foreign corporation had an office for the transaction of its usual and customary business in Jackson County. The question before the Court was whether the foreign corporation resided in Jackson County for the purpose of establishing venue. Id. at 344-345.

In Bowden, the foreign business corporation had to comply with Mo. Rev. Stat. § 351.620 (1959) in order to conduct business in Missouri. Section 351.620 required each foreign corporation that was authorized to transact business to “continuously maintain a registered office . . . [and a] registered agent.” In Bowden, where the operative statutes did not define the location of residence for a foreign business corporation, the Court in construing the applicable statute held “that the very purpose of that section [§ 351.620] is to give the foreign business corporation a fixed, definite and certain location where a representative of the corporation may be found. In effect, compliance with the statute gives the corporation what in law amounts to a definite and fixed residence in this state.” Id. at 349. The Bowden Court held that the foreign corporation was a “resident” of the City of St. Louis, irrespective of the presence of its office and agent in Jackson County. Venue was ordered transferred from Jackson County. Id.

In discussing the reasoning behind this holding, the Court went on to state:

The theory that Sec. 351.620 was intended to give foreign business corporations a specific, definite and certain residence in this state, and that Sec. 508.010, subd. (2) should be construed with it, conforms to good business practice and the proper protection of

the rights of individual defendants who may be joined with corporate defendants. Such a construction makes for definiteness and certainty and an individual defendant when so joined may immediately and definitely determine whether the venue of the action is proper or improper as to him.

Id. at 350.

There can be no doubt that § 355.161 and § 355.096 impose the same obligation on Missouri nonprofit corporations to maintain in this State, both a registered agent and registered office, as § 351.620 impose on for profit corporations. Hence, under Bowden's controlling precedent, § 355.161 and § 355.096 likewise provide Missouri nonprofit corporations with a fixed, definite and certain location where a representative of the nonprofit corporation may be found. Such a conclusion also provides for definiteness, certainty and ease in determining where venue is proper.

Therefore, SSM, as does any other Missouri nonprofit corporation that complies with § 355.161 and § 355.096 , “resides” in the county where its registered agent and registered office are located irrespective of where it may have other agents or offices. Respondent was therefore in error by ruling that Defendant SSM is a resident of the City of St. Louis because it may have an office or agent for the transaction of its business in the City of St. Louis. Venue in the City of St. Louis is improper because the cause of action accrued in St. Charles County, Dr. Bucy resides in St. Charles County and SSM resides in St. Louis County as it maintains its registered agent and registered office there. By retaining this case, Respondent has acted in excess of her jurisdiction.

III. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles County because venue is improper in the City of St. Louis under Mo. Rev. Stat. § 508.010 in that the cause of action, if any, accrued in St. Charles County, Dr. Bucy, an individual defendant, resides in St. Charles County and SSM, a Missouri nonprofit corporate defendant, resides in St. Louis County as it maintains its registered agent and principal place of business in St. Louis County.

Solely in the alternative to Points I and II, *supra*, SSM sets forth the following argument. Even if this Court should find that Mo. Rev. Stat. § 508.010 is the applicable venue statute, venue in the City of St. Louis is still improper under § 508.010, which provides that (in this case) venue is proper where any of the defendants reside or where the cause of action accrued. There is no dispute that the cause of action accrued in St. Charles County and Dr. Bucy resides in St. Charles County. The residence of a Missouri nonprofit corporate defendant should be defined by Mo. Rev. Stat. § 355.176 as the county where the nonprofit corporation maintains its registered agent or principal place of business. SSM, a Missouri nonprofit corporate defendant, maintains both its registered agent and principal place of business in St. Louis County. Therefore, because the cause of action accrued in St. Charles County and the defendants reside in St. Charles and St. Louis Counties, venue is improper in the City of St. Louis .

Respondent, relying on State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991) , incorrectly found that SSM, a Missouri nonprofit corporation, resides

“where it keeps an office or agent for the transaction of its usual and customary business.” (Appendix Exhibit 8, p. 3). Respondent’s reliance on Rothermich is erroneous as it considered only the holding and not the rationale of the Court in arriving at its decision.

In Rothermich, plaintiff brought suit against an individual and a foreign insurance company, a for profit entity. The Court found that § 508.010 was the applicable venue statute because a for profit foreign insurance corporation and an individual were being sued together. Id. at 197. Under § 508.010, venue was proper where either of the defendants resided. The issue presented to the Court was: where does a foreign insurance corporation reside for venue purposes where no Missouri case law or statutes provide a definition? Id.

The Court considered the history of “residence” of general business corporations. Residence for the purpose of general business corporations originally was established under Mo. Rev. Stat. § 351.375 (1949) , which provided the “location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.” However, by its own terms, § 351.375 did not apply to foreign insurance corporations. Id. at 198.

The Rothermich Court then looked to Mo. Rev. Stat. § 508.040,¹⁸ the statute that establishes venue where only general corporations, including foreign insurance

¹⁸ For the Court’s convenience, a copy of Mo. Rev. Stat. § 508.040 is attached in the Appendix as Exhibit 15.

corporations, are sued. Despite the fact that § 508.040 does not define “residence” for venue purposes, the Court found that statutes involving similar or related subject matter should be considered when such statutes shed light upon the meaning of the statute being construed. The Court found that § 508.010 and § 508.040 should be considered *in pari materia* because they are interrelated to the issue of venue and how it is obtained in Missouri. Based on the fact that § 508.040 applies to foreign insurance companies when they are the sole defendant, the Court found the language of § 508.040 persuasive in determining that the “residence” of a foreign insurance corporation is “in any county where such corporation shall have or keep an office or agent for the transaction of their usual and customary business.” Id. at 200.

This same reasoning was utilized previously by this Court in State ex rel. Henning v. Williams, 131 S.W.2d 561 (Mo. banc 1939), another case improperly construed by Respondent. In Henning, plaintiff sued an individual and a for profit foreign corporation. The Court was faced with defining the residence of a for profit foreign corporation. This Court, in Henning, noted that when a foreign for profit corporation is sued alone, under § 508.040, venue is proper where the corporation keeps an office or agent for the transaction of its usual and customary business. This Court went on to reason, “we can see no reason why their residences should not be regarded as established in the same way when, perchance, they are joined as defendants with another. . . .” Id. at 565. Based on this reasoning, the Court held that a foreign for profit corporation resides where it maintains an office or agent for the transaction of its usual and customary business. Id.

Essentially, in both Rothermich and Henning, the Courts defined “residence” based on where venue would be proper if the particular for profit foreign corporation was the sole defendant. This reasoning was logical because the general venue statute, § 508.040 , is applicable when these for profit corporate entities are named as the sole defendant or defendants in a lawsuit. Therefore, in analyzing where venue would have been proper had these for profit entities been sued singularly, the Henning and Rothermich Courts appropriately looked to the applicable general corporate venue statute, § 508.040, and found that a foreign corporation and a foreign insurance corporation reside where they maintain an office or agent for the transaction of their usual and customary business.

Respondent’s rationale in defining a Missouri nonprofit corporation’s residence using § 508.040 is completely illogical in light of § 355.176. In its Order, the Circuit Court stated:

“The [Rothermich] Court,[sic] considered the meaning of the word “agent”¹⁹ with respect to a foreign insurance corporation, looked to the language of § 508.040 RSMo., and noted that foreign insurance companies are treated differently under Missouri statutes. The [Rothermich] Court

¹⁹ The Rothermich Court did not consider the meaning of the word “agent” as stated by the Circuit Court. Rather, the Rothermich Court was faced with defining the “residence” of a foreign insurance company, just as this Court is faced with defining the residence of a Missouri nonprofit corporation.

concluded that the residence of a foreign insurance company under § 508.010 is any county where such corporation has or usually keeps an office or agent for the transaction of its usual and customary business.”

See Appendix Exhibit 8 at p. 4.

As stated by the Circuit Court, in defining the “residence” (not “agent”) of a foreign insurance company, the Rothermich Court noted that foreign insurance companies are treated differently than other corporations. This is because foreign insurance companies, just as Missouri nonprofit corporations, were explicitly excluded from the corporate statute defining “residence.” However, the Circuit Court entirely skipped over the reasoning or rationale of Rothermich and concluded that because the residence of a foreign corporation is defined by § 508.040 as anywhere the foreign insurance corporation has or usually keeps an office or agent for the transaction of its usual and customary business, this same result should be reached for a Missouri nonprofit corporation, irrespective of the existence of § 355.176(4). What Respondent failed to appreciate is the *reason* that the Rothermich Court reached this conclusion is because “§ 508.040 has long been held to apply to foreign insurance companies when sued individually.” Rothermich, 816 S.W.2d at 200. The Rothermich Court did not, as Respondent suggests, hold that every corporate entity without a statutorily defined residence should be deemed a resident of any county where that corporation has or maintains an office or agent for the transaction of its usual and customary business as outlined in § 508.040.

In straining to reach the same conclusion as Rothermich, the Circuit Court clearly overlooked the fact that there is absolutely no rationale for defining the “residence” of a Missouri nonprofit corporation using § 508.040 . Section 508.040 is the general corporate venue statute and does not apply when there is an applicable special venue statute such as § 355.176 for Missouri nonprofit corporations. Wasson, 646 S.W.2d at 107 (holding that special venue statutes prevail over general ones). However, notably missing in Rothermich and Henning is an applicable special venue statute, such as that which exists for Missouri nonprofit corporations. Clearly, if the Circuit Court had followed the Rothermich and Henning reasoning and rationales, it would have defined “residence” using § 355.176. If SSM had been sued singularly, § 355.176 (4), the special venue statute for nonprofit corporations, would be controlling and there is “no reason why their residence[] should not be regarded in the same way where, perchance, they are joined as a defendant with another” Henning, 131 S.W.2d at 565. There can be no doubt that if SSM had been the sole defendant in this lawsuit, § 355.176 would apply and venue would only be proper where the cause of action accrued, where Dr. Bucy resides and where SSM maintains its principal place of business or registered agent.

Because SSM does not maintain its principal place of business or registered agent in the City of St. Louis, SSM does not reside in the City of St. Louis. As the cause of action did not accrue in the City of St. Louis and neither Dr. Bucy nor SSM reside in the City of St. Louis, venue is improper in the City of St. Louis under § 508.010.

IV. Alternatively, Relator is entitled to an order requiring Respondent to transfer this case from the City of St. Louis to either St. Louis County or St. Charles

County because under Mo. Rev. Stat. § 508.010 venue is improper in the City of St. Louis in that venue cannot be established under § 508.010 solely because SSM, a Missouri nonprofit corporate defendant, might have an office or agent for the transaction of its usual and customary business in the City of St. Louis as SSM is a Missouri nonprofit corporation that maintains its registered agent and principal place of business in St. Louis County, Dr. Bucy, the individual defendant, resides in St. Charles County and the cause of action accrued in St. Charles County.

Solely in the alternative to Points I, II and III *supra*, SSM makes the following argument. If this Court finds that Mo. Rev. Stat. § 355.176 is not the exclusive venue statute when an individual and Missouri nonprofit corporation are sued, this Court should still refrain from analyzing SSM's venue contacts under Mo. Rev. Stat. § 508.040 to establish the residence of a Missouri nonprofit corporation under Mo. Rev. Stat. § 508.010 where the individual defendant does not independently meet the residence contact required by § 508.010. Simply stated, because the cause of action did not accrue in the City of St. Louis and the individual defendant, Dr. Bucy, does not reside in the City of St. Louis as required by § 508.010, SSM's venue contacts should be analyzed under § 355.176 and not under § 508.040 in the effort to establish residence for the purpose of § 508.010.

Since Dr. Bucy does not reside in the City of St. Louis, analyzing SSM's business activities under § 508.040 to determine residence to establish venue under § 508.010 would thwart the Legislature's intent in limiting a Missouri nonprofit corporation's

exposure to a known, particular and fixed number of venues as provided by § 355.176 . Additionally, upholding the strained statutory analysis utilized by Respondent promotes an impermissible bootstrapping of venue statutes in order to obtain pretensive venue over a Missouri nonprofit corporation.

If a plaintiff cannot establish venue over an individual defendant using § 508.010 to establish residence, the Circuit Court should not bootstrap the Missouri nonprofit corporation into a § 508.040 analysis, looking to the location of SSM's offices and agents to establish its residence under § 508.010 when there is a special venue statute that applies to Missouri nonprofit corporations. In other words, where a Missouri nonprofit corporation is sued with an individual(s), the Court should first consider the residence venue contact of the individual(s) under § 508.010. If the individual(s) do not reside in the City of St. Louis under a § 508.010 analysis, the Court should then consider the venue contacts of the Missouri nonprofit corporation under § 355.176 , the special venue statute, and not under § 508.040, the general corporate venue statute, which does not apply to Missouri nonprofit corporations.

In this case, the individual defendant, Dr. Bucy, resides in St. Charles County and, therefore, does not maintain the requisite residence contact to establish venue in the City of St. Louis under § 508.010. Further, the Missouri nonprofit defendant, SSM, maintains its registered agent and principal place of business in St. Louis County and, therefore, does not maintain the requisite venue contacts to establish venue in the City of St. Louis under § 355.176 , the special venue statute for nonprofit corporations. Therefore, venue is improper in the City of St. Louis.

The Circuit Court's improper analysis of the venue issue is illustrative of why this Court should analyze SSM's venue contacts under § 355.176 . In coming to the conclusion that venue was proper in the City of St. Louis because SSM might have an office or agent for the transaction of its usual and customary business in the City of St. Louis (See Appendix Exhibit 8), the Circuit Court went through an incorrect § 508.010 and § 508.040 analysis. The Circuit Court started by looking at § 355.176, but decided that it applied only where "the suit is against a nonprofit corporation or multiple nonprofit corporations." (See Exhibit 8 at p. 2). Because of the presence of an individual defendant, the Court found that § 508.010 was the applicable venue statute. Then, to define the "residence" of a Missouri nonprofit corporation, the Court looked to § 508.040 and defined the "residence" of a nonprofit corporation as any county where it has or keeps an office or agent for the transaction of its usual and customary business. Essentially, the Circuit Court grafted § 508.040, the general corporate venue statute, onto § 508.010 to determine the residence of a Missouri nonprofit corporation for venue purposes. In doing so, the Circuit Court wholly ignored § 355.176, § 355.161 and § 355.096 in its analysis in order to obtain City venue over a St. Charles resident physician and SSM, a Missouri nonprofit corporation that maintains its registered agent and principal place of business in St. Louis County.

Requiring that the venue contacts of a Missouri nonprofit corporation, when it is sued along with an individual, be analyzed under only § 355.176 prevents the confusion over which venue statute applies and keeps intact the Legislature's intent in providing Missouri nonprofit corporations with fixed and certain venue contacts.

The Circuit Court acted in excess of its jurisdiction in deciding that venue is proper in the City of St. Louis based solely on the fact that SSM might have an office or agent for the transaction of its usual and customary business in the City of St. Louis.

CONCLUSION

Relator respectfully requests that this Court make its preliminary Writ of Prohibition permanent, thereby precluding Respondent Judge Neill from taking any further action, other than to transfer the case to St. Louis County or St. Charles County, where venue is proper. Alternatively, Relator respectfully requests that this Court issue a permanent Writ of Mandamus requiring Respondent Judge Neill to order the transfer of this case from the City of St. Louis where venue is improper to either St. Louis County or St. Charles County where venue is proper and upon full hearing of all matters herein to make said writ absolute and to grant such other and further relief as this Court deems just and proper.

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 97 by which it was prepared, contains 9,332 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing the Relator's Opening Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via first class mail, postage prepaid, on this **14th** day of February, 2002, to:

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